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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3361 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

1. Whether Reporters of Local Papers may be allowed to see the judgements? - Yes

2. To be referred to the Reporter or not? -Yes

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3. Whether Their Lordships wish to see the fair copy
of the judgement? -No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder? -No

5. Whether it is to be circulated to the Civil Judge?
-Yes to all J.M.F.C.

SUBHASH KUMAR GUPTA

Versus

STATE OF GUJARAT

Appearance:

MR NAGIN N GANDHI for Petitioner

MR. M. A. BUKHARI, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

MR. BHARGAV BHATT for respondent no.2 (absent)

CORAM : MR. JUSTICE S. M. SONT

Date of decision: 01/03/96

ORAL JUDGEMENT

This application is directed against the order of

investigation under sec.156(3) of the Criminal Procedure Code, 1973 ('Code' for short) and to quash the chargesheet submitted by the Police on completion of the investigation.

Respondent no.2 had filed a complaint against the petitioner and two others on 21.3.95 in the court of JMFC, 3rd Court, Bhavnagar.

Facts alleged to constitute offences are as under:-

Respondent no.2 - complainant is the Commission Agent in vegetables, in particular onion, at Market Yard of Bhavnagar. Petitioner used to purchase onion from respondent no.2 on credit and every time lump sum payment was made. From the allegation in the complaint, the sale was on credit for a month or so. On 21.1.94 petitioner purchased onion of the value of Rs.27,31,739.00. Petitioner had paid Rs.19,94,322.52 against the same and the balance of Rs.7,37,417.51 remained due. According to the respondent no.2, despite repeated demands, false promises to pay were given. Petitioner came to Bhavnagar from Kanpur on 10.3.95. When he went to the shop of respondent no.2, he made a demand for the balance due. Petitioner did not give proper reply but started speaking irrelevantly and abused him. Along with the petitioner -accused, there was some unknown person called as Gangu. Thus, petitioner and two others gave filthy abuses to the respondent no.2 and also gave threat to kill the respondent no.2 if money is demanded again. Petitioner accused also gave 2-3 slaps to the respondent no.2 and ran away after giving filthy abuses. Based on these facts, a complaint is filed under sections 323, 406, 420, 504, 506(2), 114 of I.P.C. Learned Magistrate ordered enquiry under section 156 (3) of the Code and the Police, after investigation, submitted chargesheet under the said sections complained of. It is prayed to quash investigation and submission of chargesheet by this petition.

According to the petitioner's learned Advocate, the facts as stated in the complaint by themselves do not constitute any offence and, therefore, the order passed by the learned Magistrate for investigation under sec.156(3) is beyond the scope of the provision of law inasmuch as it suffers from vice of non-application of mind and also without jurisdiction thereby. Submission of chargesheet by the Police on these facts is also bad in law as not warranted by the facts stated by the complainant and the same is liable to be quashed.

Respondent no.2 is represented by learned Advocate Mr.Bhargav Bhatt. However, he is absent when the matter is called out. Therefore, this matter is disposed of after hearing the learned Advocate of the petitioner and learned A.P.P. Mr.Bukhari for the State.

Learned Advocate Mr.Gandhi for the petitioner contended that the facts stated in the complaint, even if taken as true, do not constitute an offence under any of the provisions of the Penal Code. In the chargesheet, the whole of the complaint filed by the complainant is reproduced. In para 8 of the complaint, it is stated that on 10.3.95, petitioner accused had come to the shop of the complainant. He talked about the accounts. He then talked irrelevant things and gave filthy abuses. There were two other persons with the accused and all the three were giving abuses and also gave threat to kill the complainant. Based on these facts, it is alleged by the complainant that the petitioner has committed cheating and a breach of trust in the purchase of a commodity, namely, onion, on 22.1.94. In Gujarat, giving threat to kill a person is a cognizable offence and a non-bailable one. Complainant, instead of approaching the Police immediately and the doctor at the earliest, though was given 2-3 slaps on his face, approached the Judicial Magistrate next day by way of a private complaint. Learned Advocate Mr.Gandhi contended that before exercise of powers under sec.202 no doubt the learned Magistrate has discretion to order investigation under sec.190, but the said discretion is to be exercised judiciously. He has not only not exercised the said discretion judiciously, but the same is also not warranted by the facts of the case. Mr.Gandhi further contended that the business community now-a-days is diverted to make out criminal cases of their civil disputes, may be because of delay in civil courts, to file complaints and invite the order of investigation by the selective Police. Police, who had all the powers to arrest, causes fear psychosis in the mind of the person against whom inquiry is ordered. The resultant effect is settlement. Such assistance given by the court in adopting this mode of recovery, such indiscriminate use of power to order inquiry under sec.156 (3), has undermined the administration of justice in the eye of the people. He, therefore, contended that the order passed by the learned Magistrate under sec.156(3) of the Code is bad in law and the chargesheet submitted by the Police in response to that order is also not warranted by the facts on record.

Learned A.P.P. Mr.Bukhari contended that there is nothing on the record to interfere with the order

passed by the learned Magistrate. He further contended that it is the discretion of the court whether to take cognizance and enquire into the matter or to order enquiry under sec. 156 (3) of the Code. Exercise of such discretion cannot be interfered with. He further contended that on completion of the enquiry under sec.156 (3) of the Code, Police has submitted chargesheet. It was again for the learned Magistrate to take cognizance or not. If the cognizance is taken from the material submitted with the chargesheet, learned Magistrate has to proceed further in accordance with law and the same cannot be interfered with by this court.

It will be necessary to refer to relevant provisions of the Code. In cases where the parties file private complaints, the same will be proceeded with under Chapter XV of the Code, title of which is 'Complaints to Magistrates'. So far as complaints to Magistrate are concerned, the same may be pertaining to offences both cognizable and non-cognizable. If an information is furnished to an officer in-charge of a Police Station of the commission of an offence of a non-cognizable offence, he is required to enter or cause to be entered the substance of that information in the book to be kept by such officer in such form as the State Government may prescribe in this behalf and refer the informant to the Magistrate (vide sub-sec.(1) of sec.55 of the Code). Under sec.156 of the Code, Officer in-charge of the Police Station is invested with the power to investigate the offence of a cognizable nature, of which information is given to him, but a party aggrieved has a right to approach the Magistrate also for taking necessary action under the penal laws for offences, be it cognizable or non-cognizable. Question, therefore, is when the party approaches the learned Magistrate for taking action under penal law, learned Magistrate has to decide from the facts disclosed before him, which according to the complainant constitutes an offence, whether it constitutes a cognizable offence or a non-cognizable offence. Learned Magistrate has also to bear in mind that if the information given to him pertains to a cognizable offence, why the complainant has not approached the Officer in-charge of the concerned Police Station. If the offence disclosed before him pertains to non-cognizable offence, then also he has to consider and bear in mind as to whether the party concerned has approached the officer in-charge of the concerned Police Station under sub-sec. (1) of sec.155 of the Code and has been referred to him or the party aggrieved has straightaway approached the Magistrate. In such a situation, the learned Magistrate has two courses open,

namely; (i) to proceed in the matter in accordance with Chapter XV of the Code or (ii) to direct investigation under sec. 156(3) of the Code. The second course to direct investigation under sec.156(3) of the Code is open to the Magistrate before he takes cognizance of the matter under sections 190, 200 and 204 of the Code. Once the Magistrate takes cognizance under sections 190, 200 and 204 of the Code, he is not entitled in law to order any investigation under sec.156 (3) of the Code. However, under sec.202 of the Code, the Magistrate has power to direct the Police to enquire in the matter, but it would not amount to investigation contemplated under sec.156 (3) of the Code. In view of the above legal position, it will be necessary to refer to the relevant sections mentioned hereinabove:

"156(3). Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

190 (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a Police report of such facts;
- (c) upon information received from any person other than a Police Officer, or upon his own knowledge, that such offence has been committed;

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

200. A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate;

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

- (a) if a public servant acting or purporting to act in the discharge of his official duties a court has made the complaint; or
- (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under

section 192;

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process:-

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a Police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

Provided that no such direction for investigation

shall be made,-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or
(b) where the complaint has not been made by the court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath;

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a Police Officer, he shall have for that investigation all the powers conferred by this court on an officer in charge of a Police station except the power to arrest without warrant".

204 (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -

(a) a summons-case, he shall issue his summons for the attendance of the accused, or
(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at certain

time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

- (2) No summons or warrant shall be issued against the accused under sub-sec. (1) until a list of the prosecution witnesses has been filed.
- (3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.
- (4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.
- (5) Nothing in this section shall be deemed to affect the provisions of section 87."

On reading the above sections, what emerges is that the learned Magistrate has discretion either to take cognizance and proceed in the matter or to direct inquiry or investigation. This discretion is required to be exercised judicially.

Question is which of the mode should be adopted by the Magistrate. Simply because he has discretion, should he take cognizance and proceed in the matter in accordance with law or should he direct inquiry or investigation by Police? Whether any guidelines is provided in any of the provisions of the Code? In my opinion, the provisions of the Code do provide such guideline. To read such guideline from the provisions of the Code, it is necessary to understand what is an investigation? To make full and complete investigation, what are the powers and limitations of, or the extent of investigating agency? What courts cannot do in inquiry or trial and what will be the help needed by the court from Police Agency?

The above issue is required to be considered and determined in view of the present trend of the litigants, professionals(legal) to go for criminal complaints and of the learned Magistrates to order investigation under sec. 156(3) of the Code indiscriminately without inquiring and applying mind whether facts stated constitute offence or dispute between the parties is not of the civil nature. It is not the job of the Postman that the Magistrate has to do on receipt of a complaint that without application of mind straightaway to order investigation under sec.156

(3), unless there is a clear case which needs investigation to assist the learned Magistrate to do justice Before he orders or directs investigation under sec.156 (3), he has to notionally decide that investigation through Police agency is needed in this case and the enquiry by himself may not be sufficient. Investigation consists generally of (1) proceeding to the spot; (2) ascertainment of facts and circumstances; (3) discovery and arrest of suspected offender; (4) collection of evidence which may consists of (a) examination of persons, including accused, and recording statement, if thought fit; (b) search of place and seizure of incriminating things; (c) consideration whether the materials are enough for submitting chargesheet. Such and other things if needed to investigate into the matter, then the question is what is that evidence to prove case cannot be procured by the court itself and complainant cannot produce it before the court without the help of investigating agency and help of the concerned Police Officer to proceed in the matter is needed. There are cases, more particularly non-cognizable offences, and some of the cognizable ones where the complainant may produce the whole of the evidence to prove the case. The learned Magistrate himself through complainant can collect necessary evidence to prove guilt. For example, in number of cases, it may not be necessary to proceed to the spot, ascertainment of facts and circumstances can be gathered by the Magistrate himself by calling the witnesses, discovery and arrest of suspected offender may not be necessary and necessary evidence to prove the case may be produced by the complainant himself with or without the assistance of the court. There may be no necessity of any search of place or seizure of the things. In such a situation, when the necessary material to prove guilt can be produced before the court with or without the help of the court by the complainant, why direction for investigation under sec.156 (3) of the Code. So, when a complaint is received be it for an offence cognizable or non-cognizable, the learned Magistrate has to look at the complaint or the information received, apply his mind and has to come to a tentative decision whether necessary material to prove the guilt of the accused can be gathered by him without any difficulty through the complaint or it is necessary to take assistance of investigating agency. If for the proof of guilt it is felt necessary to go to spot, to discover and seize some incriminating article, to search a place,etc., then direction to investigate stands justified. In all cases where the complainant approaches the court by private complaint, anything needed to prove case can be and has

to be done by complainant. For example, in facts of the case on hand, though cognizable offence is alleged to have been committed, why was it necessary to direct the Police to investigate.

Learned Magistrate has also to consider as to why the party has not approached the Police immediately on occurrence of incidence constituting offence, be it a non-cognizable offence. It is not that the parties do not approach the Police for non-cognizable offence. Normally the parties concerned do not know whether the facts which he states constitutes a cognizable offence or non-cognizable one. It is the person in authority and in charge of the Police Station who decides that the facts stated by the complainant against someone or a particular person, constitutes an offence and whether it is cognizable or non-cognizable one. It is also necessary for the learned Magistrate to bear in mind and consider that though the offence is a cognizable one, why the party has approached him directly. It may be because of some reason that the party approaches the Magistrate. If there is a reason for the party to approach the learned Magistrate instead of police, then directing Police to investigate into the matter may frustrate the purpose to complain, and grievance may not be redressed. Thus, it is not an ordinary discretion of the learned Magistrate to order, on receipt of the information amounting to any offence, to straightaway direct investigation under sec.156(3) of the Code. Sec.202 (2) of the Code empowers the Magistrate to postpone the issue of process and direct the Police to enquire into the matter. The power to order Police investigation under sec.156(3) of the Code is different from the power to direct investigation conferred by sec.202(2). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stages when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under section 156 (3) can be invoked provided he feels necessary to do so by the Magistrate before he takes cognizance of the offence under section 190(1)(a). But once he takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of section 156 (3). It may be noted further that an order made under sub-sec.(3) of sec.156 is in the nature of peremptory reminder of intimation to the Police to exercise their plenary powers of investigation under sec.156 (1). Such an investigation embraces the entire continuous process which begins with the collection of

evidence under sec.156 and ends with a report or chargesheet under sec.173. On the other hand, section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under sec.202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus, the object of an investigation under sec.202 is not to initiate a fresh case on Police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him. Thus, it is clear that a discretion is there with the learned Magistrate whether to enquire by himself either before taking cognizance or after taking cognizance. It is also open to him to direct investigation under sec.156 (3) before taking cognizance of the matter, but when, how and in what circumstances such a discretion should be exercised is required to be borne in mind by the learned Magistrate from the facts and circumstances of the case.

There is a common complaint that the complainants approach the Magistrate with complaints and powers to direct investigation under sec.156 (3) are being exercised indiscriminately and Magistrates fall prey to the wicked mind of the complainants and the alleged accused persons are in the clutches of the Police who investigate the same. This appears to be an indirect way of empowering Police authority through agency of court in the matter where Police had no authority to enquire of its own. It may be that complainant had no desire to go to Police. If complainant wanted to go to Police, where he should have ordinarily gone, why should he have approached the court. This aspect is required to be born in mind before passing any order, more particularly of investigation under sec.156 (3) of the Code. It is the duty of the learned Magistrate to decide whether any investigation is necessary in the matter or not. I am, therefore, of the opinion that whenever a direction to inquire under Section 156(3) of the Code is given, the said order of direction should be a speaking one to reflect the reason why for what material to be collected he needs the police to investigate.

Bearing in mind this aspect, if we examine the case on hand, it is very clear that the case is nothing but an abuse of the process of law by the complainant and indiscriminate exercise of discretion by the learned Magistrate, which cannot be said to be judicial one. In

the instant case, facts stated in the earlier part of the judgment suggest that there had been a transaction of sale and purchase between the parties. The parties are businessmen and the alleged incident took place at the shop of the complainant. Accused is a foreigner in the sense that he belongs to other State. No earthly reason transpires from the complaint for the accused to come to the shop of the complainant from other State, particularly when, according to the complainant, he is indebted to him. No medical evidence of the injury is forthcoming. No independent witnesses are referred in the complaint or cited with the complaint. Even from the facts stated in the complaint, the offence, if at all any committed, can be proved by the oral evidence of the complainant before the court. There is no necessity for any sort of investigation. Neither was it necessary to go to the spot; nor to ascertain any facts and circumstances in the matter. Nor any discovery or arrest of a suspected offender was required. The case made out in the complaint could be proved by the complainant by examining himself before the court with some corroborative evidence to prove the commission of incident and necessary evidence of his own to show the transaction, which appears to be a causa causans for the incident. In the circumstances of the case, it is a clear case of abuse of process by the complainant and as there is a failure on the part of the learned Magistrate to exercise the discretion judicially, the direction issued for investigation under sec.156 (3) of the Code is liable to be quashed and set aside.

Before I part with the judgment, I propose the following solution to stop indiscriminate exercise of discretionary power to order investigation under sec.156 (3) of the Code and it is that every Magistrate shall record a short order disclosing the reason why he needs investigation under sec.156 (3) of the Code through Police Agency and is not able to try himself. In absence of any such reasons, the order to direct inquiry under sec.156(3) should be treated as bad.

In the circumstances of the case, the complaint is also liable to be quashed and set aside. Rule made absolute accordingly.
